Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, et al.,

Petitioners,

v.

JEFF SESSIONS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals failed to fulfill its obligation of responsible appellate review by characterizing questions of law as questions of fact?

2. What are the appropriate standards for evaluating state interests in Section 2 vote dilution challenges?

PARTIES TO THE PROCEEDINGS

The petitioners, appellants below, are:

Southern Christian Leadership Conference of Alabama on behalf of its members and on behalf of a state-wide class of black voters;

Reverend John L. Alford, individually and on behalf of a class of black voters in the Fifteenth Circuit and District of Montgomery County;

Reverend Abraham Woods, Jr., individually and on behalf of a class of black voters in the Tenth Circuit and District of Jefferson County;

Reverend P. H. Lewis, individually and on behalf of a class of black voters in the Thirteenth Circuit and District of Mobile County;

George W. Grayson, individually and on behalf of a class of black voters in the Twenty-Third Circuit;

Charles Steele, Jr., individually and on behalf of a class of black voters in the Sixth Circuit;

Reverend John Nettles, individually and on behalf of a class of black voters in the Seventh Circuit;

Pearlean S. Jackson, individually and on behalf of a class of black voters in the Twentieth Circuit;

Reverend James Milton, individually and on behalf of a class of black voters in the Fifth Circuit;

Jesse R. Williams, individually and on behalf of a class of black voters in the Fourth Circuit;
Edwin L. Moss, individually and on behalf of a class of black voters in the Fourth Circuit;
Luther P. Carmichael, individually and on behalf of a class of black voters in the Fourth Circuit;
Mary K. Stovall, individually and on behalf of a class of black voters in the Twenty-Sixth Circuit and District of Russell County;
Arthur L. Sumbry, individually and on behalf of a class of black voters in the Twenty-Sixth Circuit and District of Russell County;
Albert Turner, individually and on behalf of a class of black voters in the Fourth Circuit;
J. S. Thomas, individually and on behalf of a class of black voters in the Fourth Circuit; and
Malcolm R. Newman, individually and on behalf of a class of black voters in the Twentieth Circuit.

The respondents, appellees below, are:
Alabama Attorney General Jeff Sessions;
Alabama Chief Justice Sonny Hornsby;
Alabama Secretary of State Billy Joe Camp;
Walker Hobbie, Jr., Probate Judge, Montgomery County;
Mike Bolin, Probate Judge, Jefferson County;
George Reynolds, Probate Judge, Jefferson County;

David G. Lightsey, Probate Judge, Bibb County;
Arthur C. Murray, Probate Judge, Calhoun County;
Emerson W. Thompson, Probate Judge,
Chambers County;
Phillip W. Jordan, Probate Judge, Cleburne County;
John W. Jones, Jr., Probate Judge, Dallas County;
E. Riley Lucas, Probate Judge, Hale County;
J. T. Harpe, Probate Judge, Henry County;
Cletus Yomans, Probate Judge, Houston County;
Alphonso Menefee, Probate Judge, Macon County;
Frank Riddick, Probate Judge, Madison County;
W. L. Noonan, Probate Judge, Mobile County;
Donald R. Cook, Probate Judge, Perry County;
Mack Diamond, Probate Judge, Randolph County;
Wallace K. Brown, Probate Judge, Russell County;
Donald Fox, Probate Judge, Tallapoosa County;
W. Hardy McCollum, Probate Judge, Tuscaloosa County; and
Jerry Boggan, Probate Judge, Wilcox County.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners seek a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review its en banc decision rejecting petitioners' challenge under Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, to the judicial election system in use in various voting districts in Alabama.

OPINIONS BELOW

The Eleventh Circuit's en banc opinion is reported as SCLC v. Sessions, 56 F.3d 1281 (11th Cir. 1995) (en banc). The panel opinion and the order vacating that opinion are reported at 18 F.3d 898 (11th Cir. 1994). The district court opinion is reported at 785 F.Supp. 1469 (M.D. Ala. 1992). The opinions are reproduced in the accompanying Appendix.

STATEMENT OF JURISDICTION

The Eleventh Circuit's decision was issued on June 14, 1995. On September 7, 1995, Justice Kennedy extended the time for filing this petition to and including October 12, 1995. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. See App. at 155.

STATEMENT OF THE CASE

In this case, plaintiffs claimed that the at-large system for electing circuit and district judges in various jurisdictions in Alabama violates Section 2 of the Voting Rights Act of 1965.[1] Plaintiffs also claimed that the circuit court configuration violates the Voting Rights Act by dispersing majority black counties into various majority white circuits.[2]

At trial, the defendants conceded that the first precondition set out in Thornburg v. Gingles, 478 U.S. 30 (1986) -- the ability of the minority to constitute a majority in a single-member district -- was satisfied in nine of the ten jurisdictions at issue. App. at 110-11. The defendants also conceded, and the trial found, that the second Gingles precondition -- the political cohesiveness of the racial minority -- was satisfied in every jurisdiction at issue. Id. at 111; R5-144-7. Although the parties disagreed sharply over the third Gingles factor -- whether the "white majority votes sufficiently as a block to enable it . . . usually to defeat the minority's

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[1] A listing of the ten jurisdictions at issue appears at pages 5-6 of the Appendix along with some basic demographic information. The major metropolitan areas in Alabama, including Birmingham (Jefferson County), Montgomery, and Mobile, were covered by the case.

[2] Petitioner raised constitutional claims as well but did not pursue them on appeal. The details of the challenge to the circuit court configuration are not relevant to the questions presented here.

preferred candidate," 478 U.S. at 51 -- the dispute was largely a function of a difference in approach rather than a difference over particular factual points. Focusing on voting patterns in contests between black and white candidates and on the history of black electoral success, the plaintiffs contended that black voters were denied an equal opportunity to elect candidates of their choice. Focusing primarily on elections between white candidates, the success of black incumbents first appointed to office, and the relatively small number of black lawyers, the defendants advocated -- and the trial court reached -- the opposite conclusion.

a. Black vs. White Contests and the History of Black Electoral Success

The plaintiffs' statistical expert, Dr. Alan Lichtman, examined virtually every election that included both black and white candidates from 1980 through 1990 in the jurisdictions at issue. His analyses revealed stark patterns of polarized voting. "For nearly 300 elections covering some twenty different public offices during a ten-year period, black voters generally lined up very strongly behind black candidates, whereas white voters generally lined up very strongly behind white candidates." Pl. Ex. 95 at 8. The pattern of strong black cohesion and minimal white crossover voting occurred in every jurisdiction at issue. See App. at 114 (cohesion and crossover figures by circuit).

Based upon the actual pattern of polarized voting in each circuit, Dr. Lichtman made projections of the vote a black candidate could be expected to receive given the relative levels of black/white registration and turnout. "In every circuit under scrutiny [he] projected that white bloc voting would generally enable white candidates to defeat black competitors." Pl. Ex. 95 at 9; see Pl. Ex. 100 (projections by circuit).

The actual experience of black candidates for county offices in the circuits at issue buttressed Dr. Lichtman's formal statistical analyses. Black electoral success in every county has been limited almost exclusively to single-member districts and majority black counties. See, e.g., Pl. Exs. 76, 83-88. Of the black office holders in 1991 in the counties at issue, fully 93 percent represented single-member districts or majority black counties. Only 7 percent -- a mere 6 black officials, including 5 initially appointed to office -- served at-large in majority white counties. Of the 213 total officials who were serving at-large in the majority white counties at issue, 97 percent were white.

The 1991 figures were not atypical. With the exception of contests in majority black counties, the success of black candidates historically has been sporadic at best. Only after voting rights litigation created single-member districts did black candidates enjoy any significant measure of electoral

success in majority white jurisdictions.[3]

Faced with the prospect of almost certain defeat in majority white jurisdictions, black lawyers generally have been deterred from running for judicial positions. Similarly, the Alabama Democratic Conference, the state's major black political organization, has been deterred from sponsoring black judicial candidates. As the organization's long-time state field director explained, "because we find ourselves many times in circuits [that] are majority white, . . . we are not going to encourage black lawyers to get out here and compete in what we would think would be futile contests." R9 - 446; see R9 - 439. Instead of sponsoring black candidates, the organization typically has contented itself with choosing among white candidates. R9-432. Candidates endorsed in such contests are by no means necessarily the black preferred candidates. R9 -446-48. If the prospects for black political success improved, the organization would recruit black lawyers to run. R9 - 432 .[4]

In the history of the state, only one black candidate who

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[3]Alabama has a long "history of discrimination against black citizens, including a legacy of disfranchisement and segregation in most areas of life." App. at 17 n. 17.

[4]When the courts below referred to the Alabama Democratic Conference's "success in recruiting black candidates," App. at 11; id. at 113, they were apparently referring to nonjudicial races in majority black voting districts. There was no evidence that the organization recruited black judicial candidates in the majority white jurisdictions at issue.

was not an incumbent prevailed in a judicial contest in a majority white jurisdiction. App. at 11. Although he was successful, he still lost four out of five white votes. D. Ex. 33 at 38. He won simply because more black than white persons happened to vote in his particular election contest. See Pl. Ex. 311; R 13 - 1433-37.

Five other black candidates who were not incumbents had run for judicial office in majority white jurisdictions at issue prior to trial. Although the candidates generally received strong black support, none received a significant percentage of the white vote.

Faced with the prospect of certain defeat, black lawyers have had to rely almost exclusively on the appointment process to gain judicial positions. See Pl. Ex. 89; R7 - 273-76. An alternative route -- the election process -- has been open to whites. Among the white judges sitting in 1991, for example, 31 percent of the circuit judges and 53 percent of the district judges had come to the bench by way of the ballot box. Pl. Ex. 89. None of the black judges in majority white jurisdictions had followed a similar path. Id. Pl. Ex. 185. All of them had been appointed.

Once appointed to the bench, black judges usually have retained their positions. Armed with the power of incumbency and protected by the allegiance of their brethren, they often have not faced opposition. At least prior to trial, those who had been challenged -- with one sui generis

exception -- had won despite their typical failure to receive strong support from the white community.

b. Judicial Elections Generally and the Number of Black Lawyers

The defendants' expert, Dr. Ronald Weber, examined only judicial elections. His analyses demonstrated that judicial candidates who received the majority of the black vote usually have won. Combining circuit and district races, Dr. Weber established that the winning candidates received the majority of the black vote in at least 50 percent of the contested elections in each jurisdiction at issue D. Ex. 36; R13 - 1417.[5]

The vast majority of contested elections that Dr. Weber analyzed were races between white candidates. Of the 353 elections that he studied, only 43 (12 percent) involved black candidates. D. Ex. 36. Of these 43 contests, 30 involved the same black candidate.[6] Only 9 of the 43 black vs. white contests -- just 2.5 percent of the 353 total races analyzed -- involved black candidates who were not incumbents. These nine contests involved six different black candidates. Only

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[5]Dr. Weber also established that most judicial contests have been uncontested. D. Ex. 39; R13 - 1398. The presiding circuit judge in Mobile explained that judges "actively" discourage lawyers from running against them as a matter of "self-preservation." R12-1239-40.

[6]Because Justice Adams was involved in 3 electoral contests (1982 primary, 1982 primary runoff, 1988 general) and there are 10 circuits at issue, Dr. Weber counted 30 Adams' races. R13 - 1438.

one was successful.

Because his analyses were dominated by white vs. white contests, Dr. Weber acknowledged that his work shed no light on the question of whether black voters would have preferred to have had black candidates in the races.

> Q. How do you respond to the assertion that black voters actually prefer a black judicial candidate and the contests between two white candidates really [are] not informative about any important issue?
>
> A. Well, certainly, my analysis really can't answer that question. I mean I just have to be speculating based upon my analysis. . . .

R13 - 1429. He also acknowledged that his work offered little information about the chances of black judicial candidates. R13 - 1427. In response to questions from the court, he acknowledged that black judicial candidates would likely face polarized voting. R13 - 1483.

To Dr. Weber, the case posed a "trade-off." R13 - 1490-91. He acknowledged that additional black judicial candidates would come forward and be elected if the structure of the election system were changed to create new majority black voting districts. R13 - 1466, 1490-91. But, black electoral success, he testified, would come at the cost of diminished black influence over elections involving white candidates. R13 - 1490-91; see R13 - 1492-93. Numerous witnesses testified that the black vote often was crucial in such contests.

Dr. Weber linked the low number of black lawyers to the low number of black judges.[7] At the same time, he predicted that more black lawyers would run for judicial office in Alabama if a districting remedy were adopted, just as more black lawyers had offered themselves to the electorate in Mississippi after judicial redistricting in that state. R13 - 1466-67.

c. State Interests

In Houston Lawyers' Ass'n v. Attorney General, the Court indicated that a state's interest in, or justification for, an electoral practice would be "a legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a § 2 violation has occurred." 501 U.S. 419, 426 (1991). At the trial of this case, evidence was presented about two aspects of the judicial election system -- the at-large feature and the numbered place requirement.

1. At-Large Feature

Circuit judges have been elected at-large since 1850. The at-large system is designed to hold judges "accountable to the public"; to provide "a linkage between [the judges and] the voters over whom the judges exercise power and authority."

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[7]In every jurisdiction at issue, the percentage of black lawyers is far lower than the percentage of black persons of voting age, and the absolute number of black lawyers in a few jurisdictions is very small. See App. at 10; Pl. Ex. 186; D. Exs. 89-115.

R11 - 878. According to the defendants' principal "state interest" witness, State Circuit Judge Lynwood Smith, this linkage balances the state's interests in judicial accountability and judicial independence. Without the at-large system, according to Judge Smith, judges will be tempted to favor litigants from their particular districts. R11 - 879, 881-88.

Many witnesses pointed out that Alabama judges already adjudicate disputes between residents of their circuits and persons who live elsewhere in the state without complaints or reports about favoritism. See R12 - 1343 (Judge Reynolds); R11 - 944 (Judge Smith); R10 - 755-56 (Judge Kennedy); R8 -398-39 (Judge Ford). Based on this fact, two judges testified that a districting remedy would not be likely to create pressure on judges to favor residents from their districts. R10 - 754-56 (Judge Kennedy); R8 - 397-99 (Judge Ford). One judge noted that "judges may tend to be more concerned about what lawyers think than what litigants think, because lawyers run against judges, not litigants." R10 - 756.

Plaintiffs presented testimony from witnesses familiar with the recently-adopted districting remedy adopted in the Mississippi judicial voting rights case. See Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988). A Mississippi circuit judge testified that he did not feel any pressure to favor persons from his district. Pl. Ex. 172. He noted that he typically does not know where litigants reside before they take the witness stand. A lawyer from Jackson, Mississippi, who served as

chairman of his county bench and bar relations committee, testified that the Mississippi system "operates the same as it did before there was subdistricting." Pl. Ex. 173 at 22. Smaller election districts have not created a problem of "home cooking."

As passionately as he felt about the dangers of a districting remedy in Alabama, Judge Smith acknowledged that existing features of the judicial system such as the judicial canons of ethics, the state judicial inquiry commission, the possibility of appeal, and the involvement of lawyers in judicial elections would help ameliorate potential problems. R11 - 902, 943-46. He also acknowledged that the use of multi-member majority white districts in combination with single-member majority black districts would dramatically reduce the problems he envisioned. R11 - 941. The presiding judge in Jefferson County (Birmingham) concurred. Pl. Ex. 174 at 65-66.

2. Numbered Place Requirement

The numbered place system was implemented for all multi-member state offices, including judicial positions, in 1927. Although not inspired by high-minded concerns over the integrity of the judicial system, the 1927 law was not motivated by racial animus. R12 - 1096-97.

According to Judge Smith, the numbered place system now serves a number of important purposes. With the numbered place system, a challenger must pick a particular judge to run against. Without the numbered place system, a

single challenger can force all the judges in a circuit into a re-election battle. Costly re-election campaigns, Judge Smith predicted, would become the norm rather than the exception. The "congeniality" of the bench would be destroyed as judges come to see their colleagues as their competitors. Good lawyers no longer would be interested in judicial careers. R11 - 889-93.

At trial, plaintiffs never suggested the use of a system that would force judges to run against each other. Instead, plaintiffs suggested a districting remedy.

d. The Decision of the District Court

In ruling against the petitioners, the district relied heavily on Dr. Weber's analysis of judicial races -- an analysis limited almost exclusively to white vs. white elections -- and repeatedly emphasized that "black preferred candidates" usually won. App. at 117, 128 - 142. In the few cases where black candidates had run without the benefit of incumbency, the court pointed to partisan politics or other factors to explain their defeats. See, e.g., id. at 134-35. Although acknowledging that it was reasonable to believe that incumbent black judges never would have won or even run for office in the first place had they not been appointed given "the perceived likelihood that they would not have succeeded," the court noted that most judges had come to the bench through the appointment

process. Id. at 116.[8]

Borrowing standards developed in employment discrimination cases, see id. at 120, the district court also compared the percentage of black lawyers to the percentage of black judges in the various jurisdictions at issue. On the basis of the comparison, the district court concluded:

> In the challenged circuits and districts where there are no black judges, the number of black lawyers is so small that the absence of a black judge would not cause one to conclude that the result was due to discrimination. The three circuits in which there is at least one black circuit judge -- the Tenth, Thirteenth and Fifteenth -- are also the circuits with the most judgeships and with the most black attorneys. In each of these three circuits, the number of black judges substantially exceeds the proportion of black lawyers to white.

Id. at 118. In denying petitioners relief, the court highlighted the number of black lawyers in each jurisdiction, and repeatedly emphasized that a remedy would result in a disproportionate percentage of black lawyers becoming judges. Id. at 118-21, 128-43.

Like Dr. Weber, the district court saw the case as posing a trade-off. The court recognized that changing the structure of

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[8]The district court opinion implied at one point that the court gave at least some weight to non-judicial races. App. at 111. But nothing in its discussion of the evidence reflects that it did so. See, e.g., id. at 113-17 (criticizing Dr. Lichtman's reliance nonjudicial races and emphasizing that Dr. Weber analyzed only judicial contests).

the election system would increase the number of black candidates elected to office; however; the court was of the opinion that enhancing the opportunity of black voters to elect black candidates would diminish their overall influence in the electoral process. Summarizing the evidence of vote dilution, the court stated:

> No one could find that election schemes in Alabama have reduced the minority vote to an empty formality or prevented minorities from substantially *influencing election outcomes.* As one witness after another has testified, the black electorate is decisive in *"influencing the outcome"* of elections and having their preferred candidate elected. . . . *The action sought by plaintiffs in this case would probably succeed in getting a small increase in the number of blacks elected to judgeships at a cost of diminished black political clout in all other judicial elections.*
>
> . . . .
>
> It does not require polarization of the races by districts to achieve *black influence* in the election process of judges. This Court agrees . . . that such polarization on balance could well be a step back in *black political influence*.

Id. at 145-46 (emphasis added)

When the court stated that "one witness after another" testified that "the black electorate is decisive in 'influencing the outcome' of elections," the court was referring to the testimony that black voters often had enough influence to be decisive in elections between *white* candidates. Compare id. at 115 (criticizing plaintiffs' expert for failing to analyze "whether blacks have the ability to influence the outcome of

the great majority of elections which are those where whites oppose whites") with id. at 117 (crediting defense expert who analyzed primarily white vs. white contests). The court had made the same point at the close of all the evidence.

> [A]t least where whites are running against whites, blacks can form a crucial part of the whites' election to office, and to that extent they are -- I don't know what the Supreme Court's term is, but to that extent they are sharing in the political process. And I know that the point of the Plaintiffs relates to there's not enough black participation and that you can't really say that somebody has participated adequately in the political process if they can't get one of their race in the number. I understand both of those points.

R13 - 1507-08 (remarks by the court).

On the question of the interests served by the current judicial election system, the court ruled that the state has a "legitimate" or "strong," but not compelling interest in maintaining the at-large feature of the election system. App. at 144. Although the court found that a districting remedy was "feasible in certain circuits," it cautioned that the possibility that such a system would foster judicial favoritism "should not be ignored." Id. at 126-27. The court also ruled that the state has "a compelling interest" in the numbered place system because it allows judges to run for re-election without competing against each other. Id. at 144-45; see id. at 121-22. Finally, the court ruled that the state has a "compelling state interest in having the pool of black lawyers large enough

to give the voters a pool of reasonable size from which to make a selection." Id. at 127. The court felt that this third interest would be compromised by a districting remedy. Id. at 127-28, 145.

e. The Decision of the Court of Appeals

Before the Court of Appeals, the petitioners raised numerous challenges to the trial court's vote dilution analysis and a key aspect of its "state interest" analysis. Petitioner contended that the "primary issues" raised by the appeal concerned "errors of law or findings based on misunderstandings of the law." En Banc Brief of Appellants at 21, SCLC v. Sessions, 56 F.3d 1281 (11th Cir. 1995) (No. 92-6257). Those issues included:

> (i) the contention that the district court applied the wrong standard by focusing on whether black voters had an opportunity to "influence[e] election outcomes," App. at 145, rather than on whether they had an equal opportunity "to elect representatives of their choice," 42 U.S.C. § 1973(b);
>
> (ii) the contention that the district court should not have relied on elections involving only white candidates in determining whether candidates preferred by black voters had been successful given that polarized voting had deterred black candidates from running and black political

organizations from sponsoring black candidates;
(iii) the contention that the district court should have compared the percentage of black judges to the percentage of black voters, not the percentage of black lawyers, in assessing vote dilution ; and
(iv) the contention that the district court should not have ruled that the pool of black lawyers was so small that a remedy would compromise a compelling state interest given that the state itself had never asserted such an interest in the district court.[9]

Id. at 23-41.

In addition to contending that vote dilution had been established as a matter of law, petitioners argued that it was not necessary to remand the case to consider the question of whether the state's interest in the challenged system might "outweigh proof of racial vote dilution." Houston Lawyers' Ass'n v. Attorney General, 501 U.S. at 427. Petitioners pointed out the district court already had ruled that a districting remedy was "feasible in certain circuits," App. at 126, and had declined the state's invitation that it rule that the state had a "compelling" interest in maintaining its at-large system. En

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[9]The reason the state did not assert such an interest is clear: it already selects numerous judges from pools no larger than those which the district court assumed to be too small. See D. Ex. 76; App. at 65-66 (Hatchett, J.).

Banc Brief of Appellants at 53-55. Petitioners argued that a state interest could preclude a remedy only if that interest were compelling and could not be protected in the absence of the challenged dilutive device. Id. at 51-53.

In affirming the judgment of the district court, the court of appeals did not address any of the legal issues raised by the petitioners. Instead, the Court subsumed all the challenges to the district court's vote dilution analysis under the rubric of a challenge to the court's ultimate factual finding on the dilution question, a finding subject to the "clearly erroneous" standard. App. at 21-22.[10] On this issue, the court of appeals ruled that there was "ample evidence in the record to support the [district] court's conclusion that factors other than race, such as

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[10]The court of appeals also stated that "Appellants do not question any of the district court's findings on the subsidiary issues of historical fact" other than "the district court's treatment of the expert testimony." 56 F.3d at 1292 & n. 21. This statement is simply not accurate. See, e.g., En Banc Brief of Appellants at 38-40 (challenging the finding that small number of black judges is caused by small number of black lawyers); id. at 41 (challenging the finding that pool of black lawyers is too small to implement districting remedy); id. at 42-43 (challenging the finding that black and white registration rates are approximately the same); id. at 43 (arguing that district court failed to consider that black voters typically have lower turnout rates than whites); id. at 45-46 (arguing that district court failed to consider that pendency of lawsuit affected black political success); id. at 46-47 (challenging the finding that party preference explains polarized voting in certain circuits); id. at 48 (challenging the finding that black candidates have enjoyed success in at-large elections in one circuit). The court of appeals did not discuss these issues.

party politics and availability of qualified candidates, were driving the election results and that racially polarized voting did not leave minorities with 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" Id. at 25 (citation omitted).[11]

The court of appeals construed the trial court's opinion to rest on the alternative holding that a districting remedy was "not feasible." Id. at 4; see id at 25-26 After canvassing the potential dangers of a districting remedy, the court concluded that the trial court had not erred in rejecting the option. Id. at 30-33. In evaluating the feasibility of a districting remedy, the appellate court considered the "State's interest in having a pool of black lawyers large enough to give the voters a reasonable choice from which to select a qualified candidate," Id. at 30; see id. at 31, despite the fact that, as petitioners pointed out, the state had not claimed it had such an interest in the district court.[12] Apparently because of the court's

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[11]In the court of appeals, the petitioners challenged the finding that party politics, rather than race, explained polarized voting in certain elections. Petitioners pointed out that the state's own expert admitted that race and party were "operating at the same time" and argued that the presence of polarized voting in party primaries undercut any partisanship explanation. Petitioners also pointed out that white Democrats had won while black Democrats had lost. See En Banc Brief of Appellants at 46-47. The court of appeals did not discuss the petitioners' contentions.

[12]See En Banc Brief of Appellants at 40-41. The state did not

earlier holding that a voting rights plaintiff must show that "*within the state's judicial model*, there exists an alternative election scheme that could serve as an appropriate section 2 remedy," Nipper v. Smith, 39 F.3d 1494, 1531 (11th Cir. 1994) (en banc) (emphasis added), cert. denied, 115 S.Ct. 1795 (1995), the court did not consider the evidence of the successful districting remedy that had been implemented in Mississippi.

Concurring, Judge Edmondson expressed the view that Alabama's interest in maintaining its current judicial election system precluded any remedy as a matter of law given that the system was "neither irrational nor . . . rare" and had not been "drawn up to discriminate against any Alabama citizens on account of race." App. at 34. Under his view of the law, Judge Edmonson explained that:

> No need exists to look at winners and losers of past elections or to speculate about why particular judicial candidates won and others lost. Most important, no need (and I think no rightful, federal judicial power) exists to compare the strength and weaknesses--as a matter of political science--of Alabama's current system of electing trial judges with the system for which plaintiffs contend.

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contend that it had raised the point; instead, it contented itself with the claim that the interest was one "which, if not explicitly contended by the state, was fairly inferred from the evidence." Panel Brief of Appellees at 34, SCLC v. Sessions, 56 F.3d 1281 (11th Cir. 1995) (No. 92-6257).

Id. at 35.

Dissenting, Judge Hatchett expressed the view that petitioners had "demonstrated a section 2 violation, for which a remedy can, and must, be employed." Id at 38. "Unlike the majority," Judge Hatchett did "not defer, under the clearly erroneous standard, to the district court because it committed", in Judge Hatchett's view, "several legal errors in arriving at its findings" on the vote dilution question. Id. at 51. On the issue of remedy, Judge Hatchett also did "not defer to the district court's findings because," according to Judge Hatchett, "the issues of remedy and 'the substantiality of [Alabama's] interest under § 2 [are] question[s] of law for this court to determine *de novo*.'" Id., citing League of United Latin American Citizens v. Clements, 999 F.2d 831, 871 (5th Cir. 1993) (en banc), cert. denied, 114 S.Ct. 878 (1994).

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED BECAUSE THE ELEVENTH CIRCUIT, BY CHARACTERIZING THE QUESTIONS BELOW IN A MANNER INCONSISTENT WITH THIS COURT'S DECISION IN THORNBURG V. GINGLES, HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

In Thornburg v. Gingles, the Court reaffirmed its "view that the clearly - erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution." 478 U.S. at 79. But the Court also observed that "Rule 52(a) 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.'" Id., quoting Bose Corp. v. Consumers Union, 466 U.S. 485, 501 (1984). Appellate courts not only have the power to correct errors of law, they have the duty to do so. See Salve Regina College v. Russell, 499 U.S. 225 (1991).

In this case, the court of appeals was not confronted with "the vexing nature of the distinction between questions of

facts and questions of law." Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982). Instead, it was clearly presented with numerous legal issues: whether the district court applied the wrong standard by focusing on black voters' opportunity "to influence" elections rather than on their opportunity "to elect" candidates of their choice;[13] whether the district court focused on the wrong elections when it relied on the results of white vs. white contests given that black candidates had been deterred from running;[14] whether the district court should have treated the case like an employment discrimination dispute and compared the percentage of black lawyers to the percentage of black judges;[15] and whether the district court

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[13]See 42 U.S.C. § 1973 (violation of amended § 2 shown by establishing that minority has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").

[14]In cases where a minority group has sponsored few, if any candidates -- for example, in cases such as this one where minority candidates have been deterred -- there are always numerous white v. white elections that can be analyzed. It is precisely because such elections have little probative value that the Court emphasized in Thornburg v. Gingles that the lower "courts must rely on other factors that tend to prove unequal access to the electoral process" in such cases. 478 U.S. at 57 n. 25.

[15]See Marshall v. Edwards 582 F.2d 927, 936 (5th Cir. 1978)(Wisdom, J.)("necessary link between the percentage of those eligible and the percentage actually selected that exists in . . . employment cases is missing in voting cases"), cert. denied, 442 U.S. 909 (1979).

was empowered to credit state interests that the state itself did not contend that it had.[16]

Instead of addressing the legal issues presented, the court of appeals subsumed them all under rubric of a challenge to the sufficiency of the evidence underlying the district court's ultimate factual finding on the issue of vote dilution. See Id. at 21-22. The characterization may have determined the outcome of the case.

"The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's [legal] determinations." Salve Regina College v. Russell, 499 U.S. at 231. Because this case concerns the voting rights of hundreds of thousands of black citizens in Alabama, the Court should grant review to consider whether the court of appeals mischaracterized the questions raised below and failed to fulfill its "obligation of responsible appellate review." Id. at 239.

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[16]This listing does not include all the legal issues raised below. See En Banc Brief of Appellant.

II. REVIEW IS WARRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS OVER THE PROPER TREATMENT OF STATE INTERESTS IN VOTING RIGHTS CASES

Between the passage of the 1982 amendments to the Voting Rights Act and the Court's 1991 decision in Houston Lawyers' Ass'n v. Attorney General, 501 U.S. 419, a state's interest in a challenged electoral practice was considered a minor factor in the Section 2 "totality" inquiry. See S. Rep. No. 417 at 29 & n. 117, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News 177, 207 [hereinafter, "Senate Report"]. More importantly, it was considered a factor that cut in only one direction. If a state's interest in a challenged device was tenuous, it was typically considered "circumstantial evidence that the device had a discriminatory result" or was "unfair." E.g., United States v. Marengo County Comm'n, 731 F.2d 1546., 1571 (11th Cir.) cert. denied, 469 U.S. 976 (1984). But, in accordance with the legislative history, it had been understood in the lower courts that "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." Senate Report at 29 n. 117; see, e.g., United States v. Marengo County Comm'n, 731 F.2d at 1571.

The Houston Lawyers decision changed this

understanding. The Court ruled not only that a "State's justification for its electoral system is a proper factor . . . to assess in a racial vote dilution inquiry," but also that the state's interest could "outweigh proof of racial vote dilution" in a given case. Houston Lawyers' Ass'n v. Attorney General, 501 U.S. at 427.

Since the Houston Lawyers' decision, the courts of appeal have taken conflicting approaches to the assessment of state interests in vote dilution cases. In the Fifth Circuit, the weight of a "state interest, determined as a matter of law, is balanced against . . . evidence of racial vote dilution." League of United Latin American Citizens v. Clements, 999 F.2d at 868. Likewise, the Sixth Circuit has held that the state interest must be weighed "against" evidence of vote dilution "in evaluating the totality of circumstances." Cousin v. McWherter, 46 F.3d 568, 577 (6th Cir. 1995).

In the Eleventh Circuit, on the other hand, a state's interest "has minimal relevance in the totality of circumstances analysis," Nipper v. Smith, 39 F.3d at 1542; see id.. ("State's linkage interest is of little, if any, relevance in [racial bias] inquiry"), but "a major role" in determining whether there are feasible, alternative remedies to the challenged electoral system. Id. Not only does the plaintiff have the burden of establishing a feasible, alternative remedy as a "threshold" matter, he or she must also establish that the remedy is "within the confines of the state's judicial model." Id. As this

case illustrates, the fact that a remedy has proven to be feasible in another state is apparently of no consequence. See App. at 70 (Hatchett, J., dissenting) (discussing Mississippi districting plan not discussed in majority opinion). While the Fifth and Sixth Circuits consider the weight of a state interest to be a question of law, the Eleventh Circuit treats the issue of the feasibility of an alternative remedy that may compromise a state interest as a question of fact.

In petitioners view, neither the approach taken by the Fifth and Sixth Circuits nor that taken by the Eleventh Circuit is correct. Because every voting rights case involves a matter at the heart of a state's system of self-government -- one of its electoral practices -- the weight to be accorded a state interest cannot be settled by a resort to maxims about federalism and state sovereignty in the manner suggested by the Fifth Circuit. See League of United Latin American Citizens v. Clements, 999 F.2d at 871-73. In evaluating the weight or preclusive effect to be given to a state interest, the lower courts should determine whether the state already allows practices that compromise its purported interest, whether there are other ways for the state interest to be protected in the absence of the challenged dilutive device, and whether there are ways to remedy vote dilution even if the dilutive device is retained. In no event should a lower court be permitted to credit an interest that the state does not contend that it has. Deferring to trial court decisions on the issue of whether a remedy is

"feasible" without establishing standards to guide the inquiry risks subordinating the federal interest in eradicating vote dilution to state concerns.[17]

However state interests should be assessed, the Court should grant review here to resolve the conflict in the circuits and to provide guidance to the lower courts. There are numerous pending voting rights challenges to judicial election schemes. See Ann. M. Scruggs, et al., Recent Voting Rights Act Challenges to Judicial Elections, 79 Judicature 34 (1995). Given that the Court has not limited consideration of state interests to voting rights cases challenging judicial elections, see Houston Lawyers' Ass'n, v. Attorney General, 501 U.S. 426-27, the issue is now arising in non-judicial voting rights cases as well. See, e.g., Marylanders for Fair Representation, Inc. v. Schaffer, 849 F.Supp. 1022, 1062-63 (D. Md. 1994) (three-judge court) (challenge to state legislative redistricting plan).

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[17]These arguments were raised below. See En Banc Brief of Appellants at 51-53.

CONCLUSION

For all the above reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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